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No. 222

IN THE

Supreme Court of the United States

October Term 1948

RAILWAY EMPLOYES' DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, ET AL.,

Petitioners,

VS.

NORTHERN PACIFIC RAILWAY COMPANY,

Respondent.

Brief for Respondent Northern Pacific Railway Company Opposing Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

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L. B. daPONTE,
M. L. COUNTRYMAN, JR.
176 East Fifth Street,
St. Paul 1, Minn.,
Counsel for Respondent.

Review Publishing Co., 141 E. Fifth St., St. Paul, Minn. Cedar 1240

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STATEMENT

This cause arose upon appeals from two judgments of the United States District Court for the District of Minnesota in favor of respondent and against Arthur D. Reynolds, Collector of Internal Revenue, for the refund of Carriers Taxing Act taxes erroneously and illegally collected from respondent on account of wages paid by Addison Miller Company and A. W. Partridge Company to individuals in the employ of those companies. They were called for hearing and

argued with Nos. 13579 and 13582, (R. 685), which were, respectively, appeals by Collector Reynolds from judgments of the United States District Court for the District of Minnesota in favor of Chicago, Saint Paul, Minneapolis and Omaha Railway Company and Great Northern Railway Company for refund of Carriers Taxing Act taxes erroneously and illegally collected from those companies. The four actions were pending at the same time in the same Court and involved similar factual situations and identical questions of law (R. 653). The Memorandum Order of the District Court in the two actions brought by respondent was made the basis for the judgments rendered against the Collector in the actions brought by the Chicago, Saint Paul, Minneapolis and Omaha Railway Company and the Great Northern Railway Company (68 Fed. Supp 499), and the judgments of the District Court in all four cases were affirmed by the Circuit Court of Appeals for the reasons given in its opinion in Nos. 13583 and 13586. The mandates of the Circuit Court of Appeals in Nos. 13583 and 13586 were filed in the District Court on July 28, 1948, and new judgments were thereupon entered.

Certificates of probable cause having been made and filed in these cases, pursuant to Section 989 of the Revised Statutes (28 U.S.C.A. § 842) the judgments became payable out of the Treasury of the United States. On July 29, 1948, respondent was advised that the Solicitor General of the United States had decided that no petition for certiorari would be filed in any of the four cases. Stipulations between respondent and the Collector duly signed by their attorneys of record, waiving the right of appeal from the judgments entered pursuant to the mandate of the Circuit Court of Appeals, were accordingly made and filed in the District Court on August 2, 1948.

Petitioners had been permitted to intervene in No. 674 Civil in the District Court and they joined only in the appeal in No. 13586. Their petitions for leave to intervene in the Great Northern and Omaha cases were denied and they were not parties to those cases or to the appeals in Nos. 13579 and 13582. Their intervention was permitted in No. 674 Civil upon a petition alleging that they were unincorporated associations and labor unions acting as the representative of their members and other employees in their respective crafts or classes "for the purposes of collective bargaining and other purposes"; that among their members were a large number of individuals "who are now or have been in the past on the payroll of Addison Miller, Inc., or its successor, the Addison Miller Company"; that a judgment determining that respondent was not liable to pay taxes under the Carriers Taxing Act on employees rendering service in connection with the operations of the Addison Miller Company under its contracts with respondent would "necessarily have the practical effect of determining the status of the same employes under identical definitions of a companion statute, the Railroad Retirement Act, and hence will determine their rights to receive annuities under that statute"; that therefore intervenors and the employees they represent had "a definite and direct interest in the outcome of this case and in any interpretation made by this court of the Carriers Taxing Act or the Railroad Unemployment Insurance Act"; and that the answer proposed to be filed by the intervenors presented "issues of law and fact which are common to the issues presented by the complaint of the plaintiff and the answer of the Collector of Internal Revenue" (R. 20-25).

None of the individuals whom the petitioners undertook to represent by their intervention either sought to intervene or authorized the petitioners to represent their interests. The taxes erroneously and illegally assessed and collected from respondent, however, included the tax on employees imposed by Internal Revenue Code Sec. 1500, which it was claimed should have been but had never in fact been deducted from the compensation of the individuals in question. Petitioners did not offer to pay or to secure the payment by such individuals of those taxes.

Although petitioners took the position that the individuals in question were employees of respondent for the purposes of the railroad legislation involved, they bargained collectively on behalf of those individuals with the Addison Miller Company and they entered into formal agreements with that Company fixing hours of service, rates of pay and working conditions for individuals employed on the ore dock and coal dock work in question in this case (R. 199, 427).

ARGUMENT

1. The Question Determined by the Circuit Court of Appeals Affects only the United States, and the Decision Below, Having Been Accepted by the Solicitor General, Ought Not to be Reviewed by this Court.

In arguing, as a reason for granting the writ, that the decision of the circuit court of appeals determines an important question under the Carriers Taxing Act which has not been, but should be, decided by this court, petitioners assert that "It became apparent, immediately upon the institution of the present suit in the trial court, that not only the tax liability of respondent under the Carriers' Taxing Act would be determined, but also the right of the employees involved to participate in the social benefits of the Railroad Retirement Act, the Railway Labor Act, and other applicable railroad statutes". This assertion is not only unsubstantiated, but is contradicted by statements in the opinions of both of the courts below and is manifestly unsound. The trial court said: "The question in this case is not whether plaintiff was an 'employer' under the Act, because that it obviously is; *nor is it necessarily that the employees involved are 'employees' within the definition of sec. 1532(b)*; essentially the question is whether this plaintiff is the employer of these employees within the meaning of the Act" (R. 655) (Italics ours). The Circuit Court of Appeals said: "it is the whole or class action of the Commissioner that is here being tested and not the question of whether some specific worker in some special situation had been sufficiently bossed, supervised or directed so that he might individually claim the right to be regarded as a railroad employee." (R. 697). Moreover, the decision below does not preclude the

claim that by the terms of their contracts the contracting companies were controlled by railroads to such an extent as to be themselves "employers" subject to the Carriers Taxing Act and to bring the individuals in question within the coverage of that legislation.

Had any individual on the payroll of the Addison Miller Company or the A. W. Partridge Company intervened in these cases or authorized the labor union of which he was a member to intervene on his behalf, his right to be deemed an employee of respondent, together with his consequent liability to respondent for the Carriers Taxing Act taxes which Collector Reynolds had forced Respondent to pay on his behalf, might conceivably have been judicially determined. But each of those individuals undoubtedly had and still retains the right to determine for himself whether he should assert or oppose the claim that while working for the contractor he was subject to the Carriers Taxing Act rather than the Social Security Act and liable for the much higher taxes which the former imposes. It is, therefore, not understandable how his individual rights could be judicially determined in litigation to which he was not personally a party. Petitioners were plainly without authority to submit the individual rights of any of their members for adjudication in these cases. *Elgin J. & E. R. Co. v. Burley,* 325 U. S. 711. And they did not purport to do so by their intervention.

No presumption can arise from the fact of petitioners' intervention on the side of the collector that the position which they take represents the desires or the position of all or any large number of the individuals for whom they presume to speak. By no means all of those individuals are members of the intervening unions or represented by them. Petitioners did not pretend to represent the Boarding Camp workers, for example (See R. 559).

The individuals in question have not only enjoyed the lower tax rate under the Social Security Act, but have had the benefit of state workmen's compensation acts and state unemployment benefits and have collected overtime compensation under the Fair Labor Standards Act (R. 692, 693). As the court below observed (R. 694), to weigh the comparative advantages to the workers of remaining under that system or coming under the railroad legislation "would involve a close teetering of the scale pans". In *Pennsylvania Railroad Company v. The United States*, 70 Fed. Supp. 595, the railroad company was held entitled to a refund of Carriers Taxing Act taxes collected from it in respect of wages paid by the Jersey Contracting Corporation to individuals hired by that company in the performance of contracts for the transfer of freight between freight cars and lighters operated by the Railroad Company at Jersey City and the opinion of the Court of Claims in that case states that "a representative of the employees involved testified in this proceeding and strongly urged that they be left outside the Carriers Taxing Act and other legislation relating to employees of carriers".

Neither petitioners nor any of the individuals they pretend to represent have any interest different from that of the public at large in the question whether the judgments below in favor of respondent shall or shall not be paid out of the public treasury. It is of no legitimate concern to them whether respondent is or is not liable for taxes on the wages of those individuals. The Solicitor General of the United States is the authorized representative of the public to determine authoritatively whether this court shall be asked to review those judgments. When he has decided against seeking such review, those who have been permitted to intervene in the cause merely because of the existence of common ques-

tions of law and fact which may arise in other litigation involving different parties should not be heard to assert that such questions should be decided by this court *in this cause*. In an analogous situation, this court has denied to an intervening city the right of appeal from a judgment enjoining the enforcement of a rate order of a State Commerce Commission reducing the rates of a street car company where the Commerce Commission and the Attorney General of the State elected not to appeal. *City of Chicago v. Chicago Rapid Transit Co.*, 284 U. S. 577, 52 S. Ct. 2, 76 L. Ed. 501.

The decision below does not purport to determine, nor could it determine, the rights of any of the individuals concerned. None of them is or could be precluded by the judgments below from asserting and ultimately having judicially determined his individual right to benefits under the railroad retirement and unemployment legislation. By express provisions in that legislation no court may pass on claims for benefits thereunder until the Railroad Retirement Board has finally acted thereon, and no one but the claimant and the Railway Labor Organization to which he belongs may obtain a court review of the Board's decision. See 45 U. S. C. Secs. 228 j, 228 k (as amended July 31, 1946) and 355 (f). Conceding that the decision below will be regarded by the Board and by a reviewing court as a precedent for the proposition that the mere fact that an individual's work rendered prior to January 1, 1947, was an integral part of railroad operation and rendered on railroad premises would not in itself be sufficient to justify a finding that he was "subject to the continuing authority of (the railroad company) to supervise and direct the manner of rendition

of his service," the decision below will still be subject to be overruled by this court if deemed erroneous. Until the question is presented in a case directly involving the right of a worker to benefits under the Acts in question, or in a case in which the United States by its Solicitor General seeks a review, this court obviously should refrain from deciding the question.

2. The Decision of the Circuit Court of Appeals is Not in Conflict with any Decision of this Court.

Petitioner's assertion that "The Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court" cannot be reconciled with their first proposition that the decision below "determines an important question under the Carriers Taxing Act which has not been, but should be, decided by this Court". In fact it is difficult to determine from the discussion in Petitioner's Brief what precise federal question is claimed to have been decided contrary to applicable decisions of this court.

Upon the trial of this case there was (in the view most favorable to petitioners) a conflict in the evidence upon the question whether respondent had the right to or did in fact supervise or direct the manner of rendition of the services of employees of the contractors. The defendant collector and the Intervenors introduced the testimony of fifteen individuals who had been in the employ of the Addison Miller Company. It may be noted, for whatever significance it may have, that twelve of them were in respondent's employ at the time of the trial and were then entitled to the benefits of the Railroad Acts and subject to their burdens. Respondent introduced the testimony of the Western Manager of

Addison Miller Company (R. 184-248), the President and Manager of the A. W. Partridge Company (R. 249-267) and four of its own division superintendents (R. 273-362), all of whom testified that Respondent neither had the right to nor did in fact supervise or direct the manner of rendition of the services of either the contractors or their employees. The trial court found as facts that the contractors did "hire, fire, pay and supervise their own employees" (R. 654, 667), and that "none of the individuals with respect to whose compensation said taxes were assessed and collected from plaintiff stood in an employment relationship to plaintiff or was in its employ" (R. 665, 670). The trial court made no findings as to "the *amount* of supervision or *degree* of control exercised by the plaintiff over any of the *individuals* involved" because it concluded from a consideration of the history of the social legislation in question "that Congress presupposed that one engaged in the 'service' of an employer must also stand in an employment relation to him—that is, be on his payroll and have a contract for hire with him" (R. 664, 665). Thus, the only questions for decision by the Circuit Court of Appeals were whether the trial court's finding that none of the individuals in question were in respondent's employ was either (1) induced by an erroneous view of the law, or (2) plainly contrary to the evidence.

The long and careful opinion of the Circuit Court of Appeals shows that it examined the entire record and concluded therefrom as matter of fact that "there is no basis to hold that either of the contracting companies had so surrendered its right of control *or had so failed to exercise it in fact* as to have lost in effect its identity or status as a separate business enterprise in furnishing the services involved, or to have caused the relationship of the workers to that enterprise to have been economically dissolved, within the lan-

guage and spirit of the Carriers Taxing Act as then existing" (R. 698. Italics ours). It stated further that "the record in our opinion would not permit of a holding that all of the workers generally or as classes were entitled to be regarded as employees of the Railway Company prior to the 1946 amendment of the statute" (R. 702). Thus it rejected the contention that the trial court's finding of fact was contrary to the evidence.

The only remaining question was whether, by the definition of "service" in the Carriers Taxing Act, as it existed prior to the 1946 amendments, Congress had evidenced an intent to require employees of railroad contractors to be deemed employees of the railroad company on whose premises they worked, whenever their services were functionally "integrated" into the operations of the railroad. This question the Court answered in the negative on the ground that "From the beginning of the recent social legislation for railroad employees, Congress was cognizant of the long-established practice obtaining in the railroad world of contracting for the furnishing by outside contractors of services such as those here involved, and it chose not to include such contract workers generally or as a class in the scope of this railroad legislation" (R. 698). This was the only Federal question decided by the Court below.

There is no pretense that the question of law thus decided by the Circuit Court of Appeals has ever been the subject of any decision by this Court. It was decided in the same way by the Court of Claims in *Pennsylvania Railroad Company vs. The United States*, 70 Fed. Supp. 595, and the Solicitor General elected not to apply for a writ of certiorari in that case. No decision of this Court requires any particular facts to be regarded as controlling in determining the existence or non-existence of employer-employee relation-

ships under any federal statutes. On the contrary, in *United States v. Silk*, 331 U. S. 704, this Court, after enumerating some of the facts to be considered, expressly said that "No one is to be considered controlling" (P. 716), and that "Where a part of an industrial process is in the hands of independent contractors, they are the ones who should pay the Social Security taxes." The Circuit Court of Appeals did not ignore the cited decisions of this Court but expressly stated that "the question necessarily must be viewed in the light of *United States v. Silk*, 331 U. S. 704, 67 S. Ct. 1463, 91 L. Ed. ...., *Bartels v. Birmingham*, 332 U. S. 126, 67 S. Ct. 1547, 91 L. Ed. ...., and the other recent expressions of the Supreme Court dealing with the sound determination of enterprise status and employer-employee relationship" (R. 698). Nothing in its opinion justifies a claim that it ignored "economic realities", or that it restricted its determination by any "technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants" or that it failed to give proper consideration to any of the criteria essential to a determination of the employer-employee relationship as established by decisions of this Court.

The only relief sought or possible in this case is a remand to the trial court for further findings. If there were any substantial basis for supposing that the Circuit Court of Appeals had failed to follow applicable decisions of this Court in reviewing the factual determinations of the trial court, it may safely be assumed that the Solicitor General would have applied for certiorari in this case. Whether the judgments of the District Court are now subject to be reopened after the parties thereto have by stipulation waived the right of appeal therefrom may at least be doubted.

3. The Decision Below is not in Conflict with any Decisions of Other Circuit Courts of Appeal.

As stated by the Circuit Court of Appeals (R. 693) "the question here is not the usual one of whether the workers involved will be left excluded from some general field of social legislation, for they are admittedly within the operation of either the Social Security Act or the Railroad Retirement Act, both of which have the same social purpose in their respective fields of coverage and only one of which can be applicable to the work under consideration" (R. 693). None of the decisions in the other circuits cited by petitioners involved a question like that presented here. The only reported decisions involving the precise question determined by the Circuit Court of Appeals in this case are *Pennsylvania R. R. Co. v. U. S.*, 70 Fed. Supp. 595, in which the Court of Claims decided the question in the same way, and the Solicitor General decided not to apply for certiorari, and *Wabash R. R. Co. v. Finnegan*, 67 Fed. Supp. 94, decided within the Eighth Circuit by the District Court for the Eastern District of Missouri, which was disapproved by the Circuit Court of Appeals in its opinion herein (R. 701).

4. The Circuit Court of Appeals Correctly Held that the 1946 Amendment to the Carriers Taxing Act could not be given Retroactive Effect by Treating it as a mere Clarification of the Prior Definition of "Service".

We agree that the Circuit Court of Appeals erroneously construed the effect of the 1946 Amendment to the definition of the term "service" in the Carriers Taxing Act, but for a very different reason than that assigned by petitioners. The plain purpose of that amendment, as shown by the quota-

tion in petitioner's Brief (P. 24), was to clarify the status of *individuals* with whom railroads occasionally make contracts "which purport not to be contracts of employment but under which the *individual* is for all practical purposes an employee and not an independent contractor." The purpose was not to change or affect the status of employees of bona fide independent contracting companies, for Congress rejected a proposed amendment designed to bring such contractors and their employees within the coverage of the railroad legislation. The purpose obviously was only to make certain that *individuals* who *personally perform* services integrated into railroad operations under contracts directly with the railroad company purporting to make *the individual* an independent contractor shall henceforth be treated as employees of the railroad company regardless of the terms of the contract. Clearly it was not designed to require corporations or independent companies who contract with a railroad to be treated as employees or to affect the status of individuals whom they employ.

But if the 1946 Amendment can be stretched to cover in dividuals hired by independent contracting companies engaged in the performance on railroad premises of work functionally integrated into the operations of the railroad, it can not by an stretch of the imagination be regarded as a clarifying amendment, in view of the prior refusals by Congress to include such contract workers generally or as a class in the scope of this railroad legislation. To construe it as merely clarifying under such circumstances would be to give it retroactive effect contrary to the expressed will of Congress and, as said by the Circuit Court of Appeals, "to outwit Congress".

CONCLUSION

In view of the determination of the Solicitor General not to apply for a writ of certiorari in this case or in the companion cases of the Great Northern Railway Company and the Chicago, St. Paul, Minneapolis and Omaha Railway Company involving similar facts and identical questions of law, and the stipulation of the parties waiving the right of appeal from the judgments entered herein on the mandates of the Circuit Court of Appeals, a reversal of the judgments in the actions brought by this respondent while necessarily allowing the others to stand would work a grave injustice upon respondent. Neither petitioners nor the individuals whom they pretend to represent are bound by or adversely affected by those judgments or by the decision of the Circuit Court of Appeals herein and they should not be heard to complain thereof or to seek a decision by this Court in this cause of questions which may hereafter arise in other litigation as to the rights of such individuals against the United States. The petition should therefore be denied.

Respectfully submitted,

L. B. daPONTE,
M. L. COUNTRYMAN, JR.
176 East Fifth Street,
St. Paul 1, Minn.,
Counsel for Respondent.